



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2004

Ms. Laura Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge
P.O. Box 160606
San Antonio, Texas 78246-060

OR2004-5275

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204004.

The Northside Independent School District ("NISD"), which you represent, received a request from the State Board of Educator Certification for documents regarding a named teacher. You claim that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.107, 552.114, 552.117, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your claim that pages AG-0033, AG-0034, and AG-0058 are protected by the attorney-client privilege, which is found in section 552.107 of the Government Code. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators,

investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You inform us that pages AG-0033, AG-0034, and AG-0058 constitute or document communications between an NISD employee and attorneys representing NISD in furtherance of the rendition of professional legal services. You state that the communications were intended be confidential. There is no indication that confidentiality between NISD and its attorneys has been waived. Therefore, NISD may withhold pages AG-0033, AG-0034, and AG-0058 under section 552.107.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Pages AG-0040-0043 consist of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261. Therefore, this information is

within the scope of section 261.201 of the Family Code. You have not indicated that NISD has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, pages AG-0040-0043 are confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, NISD must withhold these documents from disclosure in their entirety under section 552.101 of the Government Code as information made confidential by law.

We next address page AG-0025, which you claim is excepted from disclosure under section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides "A document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* The document at issue relates to a teacher, but does not evaluate the teacher for the purposes of section 21.355. Therefore, we determine that AG-0025 is not confidential under section 21.355 of the Education Code.

We next address your claims regarding pages AG-0027-0032, AG-0035-0039, AG-0044-0057, and AG-0059-0074. Section 552.026 of the Government Code states that the Public Information Act does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* 20 U.S.C. § 1232g; *see also* Open Records Decision No. 634 at 6-8 (1995). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). The documents at issue directly relate to a student and are maintained by NISD. Thus, these documents are education records and are subject to the requirements of FERPA. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the information on pages AG-0027-0032, AG-0035-0039, AG-0044-0057, and AG-0059-0074 which identifies students and therefore must be withheld under FERPA.

We next address your claim that portions of the remaining information are protected under common law privacy. Section 552.101 encompasses the common law right to privacy. For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

You indicate that the remaining information pertains to NISD's investigation of an allegation that the named teacher was involved in a sexual relationship with a student. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Here, because there is no adequate summary of the investigation, the information in the remaining documents is subject to disclosure. However, under the decision in *Ellen*, the identities of the victims and witnesses in the remaining information are protected by common law privacy. See *Ellen*, 840 S.W.2d at 525. As discussed above, information that identifies students, including the victim, must be withheld under FERPA and has been marked accordingly. Therefore, only the identity of the school district employee who was a witness must be withheld under section 552.101 in conjunction with common law privacy. The identities of school district employees who investigated the allegations against the named teacher are not protected by common law privacy, as these employees cannot be considered witnesses under *Ellen*.

Next, we consider your claim that some of the remaining information is excepted from disclosure under section 552.117. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, NISD may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. In this instance, you state that the named

teacher made a timely election to keep his personal information confidential. Thus, NISD must withhold named teacher's personal information, which we have marked, under section 552.117.

We note that page AG-0009 contains a list of NISD employees and the last four digits of their social security numbers. NISD must withhold under section 552.117 the social security information of any employee who made a timely request for confidentiality under section 552.024. We have marked this information accordingly. In the alternative, we note that this social security information may also be excepted from disclosure under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by NISD pursuant to any provision of law, enacted on or after October 1, 1990.

Next, we note the presence of a Texas driver's license number on page AG-0026.¹ Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

NISD must withhold the marked Texas driver's license number under section 552.130.

Finally, we consider your claim that section 552.135 protects the identities of school district employees found in the remaining information. Section 552.135 provides as follows:

¹This office will raise mandatory exceptions like sections 552.130 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). The school district employees whose identities are at issue under section 552.135 acted as investigators for NISD and cannot be considered informers under section 552.135. Therefore, none of the remaining information is excepted from disclosure under section 552.135.

In summary, NISD may withhold pages AG-0033, AG-0034, and AG-0058 pursuant to section 552.107. Pages AG-0040-0043 are excepted from release under section 552.101 in conjunction with section 261.201 of the Family Code. NISD must withhold, under FERPA,

the marked information on pages AG-0027-0032, AG-0035-0039, AG-0044-0057, and AG-0059-0074 which identifies students. NISD must also withhold the marked witness identifying information under section 552.101 in conjunction with common law privacy. NISD must withhold the named teacher's marked personal information under section 552.117. NISD may be required to withhold its other employees' social security information found on page AG-0009 under section 552.117, or in the alternative this information may be excepted from disclosure under section 552.101 in conjunction with federal law. Finally, NISD must withhold the Texas driver's license number on page AG-0026 under section 552.130. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 204004

Enc. Submitted documents

c: Tracy Thomas
Professional Discipline Unit
Texas State Board for Educator Certification
4616 West Howard Lane, Suite 120
Austin, Texas 78728
(w/o enclosures)